

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

CONSERVATION LAW FOUNDATION, INC.

Plaintiff,

Case No. 1:14-cv-549-LM

v.

PROPOSED
CONSENT DECREE

FAY'S BOAT YARD, INC.,

Defendant.

WHEREAS, Plaintiff Conservation Law Foundation, Inc. ("CLF") filed this action on December 8, 2014, against Defendant Fay's Boat Yard, Inc. ("Fay's"), alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, at Fay's alleged water transportation and boat building and repair facility and seeking declaratory and injunctive relief, civil penalties, and attorneys fees and costs;

WHEREAS, CLF has alleged that Fay's owns and operates a water transportation (SIC 4493) and boat and ship building and repair (SIC 3732) facility located at 71 Varney Point Road, Gilford, NH 03249 (the "Facility");

WHEREAS, CLF has alleged that the Facility discharges stormwater associated with industrial activity to Lake Winnepesaukee;

WHEREAS, the Multi-Sector General Permit (MSGP) regulations governing certain stormwater discharges associated with industrial activity expired on September 29, 2013 and has not been renewed as of the date of this decree;

WHEREAS, the United States Environmental Protection Agency ("EPA") has determined, by a memorandum dated September 27, 2013, as extended by subsequent memoranda, that it will not process further stormwater permits under the expired MSGP regulations until they are renewed;

WHEREAS, in accordance with this Consent Decree, Fay's has agreed to apply for a stormwater permit for the Facility once the applicable regulations are repromulgated and become effective;

WHEREAS, Fay's prepared a stormwater pollution prevention plan ("SWPPP") which it asserts complies with the terms of the expired MSGP regulations, as well as changes proposed in the 2013 draft MSGP regulations, and which it has provided to CLF;

WHEREAS, Fay's has implemented both long-standing and other improvements to its stormwater pollution prevention program, prior to the filing of the complaint, including, but not limited to bulkheads lining much of the shoreline with filter fabric to re-direct groundwater flow away from the lake, vegetated and crushed stone buffers to intercept the stormwater flow; dry wells at the facility to enhance infiltration; containment berms at select locations; self-contained boat wash stations connected to the municipal sewer; a boat waste pump out station located on the fueling dock area connected to the municipal sewer system; appropriate secondary containment; and placement of absorbent containment booms located at both the Launch Ramp and the Fueling Docks;

WHEREAS, CLF is a regional, nonprofit environmental organization;

WHEREAS, CLF has alleged, in its complaint (the "Complaint") and in a letter (the "Notice Letter") dated September 24, 2014, sent to Fay's and others, that Fay's has violated and continues to violate Section 301(a) of the Federal Water Pollution Control Act ("Clean Water Act" "CWA" or "Act"), 33 U.S.C. § 1311(a);

WHEREAS, CLF and Fay's (the "Parties") agree that resolution of this matter without further litigation is in the best interest of the Parties;

WHEREAS, Fay's does not admit any of the facts, violations or liability alleged in the Complaint;

NOW, THEREFORE, without the trial of any issue of fact or law, without the admission by Defendant of any of the facts or violations alleged in the Complaint, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365(a) (Clean Water Act jurisdiction). An actual, justiciable controversy exists between CLF and Fay's. The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 33 U.S.C. § 1365(a).

2. Venue is properly vested in this Court pursuant to 33 U.S.C. § 1365(c)(1), because the events giving rise to this action occurred at the Fay's Facility, located at 71 Varney Point Road, Gilford, NH 03249, which is located within this judicial district.

II. COMPLIANCE PROGRAM

3. Fay's has developed a written Stormwater Pollution Prevention Plan ("SWPPP") and provided a copy of its SWPPP in electronic format to CLF. Fay's asserts that its SWPPP meets

the requirements of the 2008 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("2008 MSGP"), which expired on September 29, 2013, and CLF has no comments on the SWPPP. Reissuance of the MSGP is pending. As set forth herein, Fay's will update its SWPPP as necessary to comply with the reissued MGSP when the reissued MSGP become effective. The MSGP, as it may be updated or reissued from time to time, is incorporated into this Consent Decree by reference.

4. During the term of this decree, Fay's will operate in accordance with the 2008 MSGP and will, within thirty (30) days of the date that EPA issues a new general permit, submit a complete and accurate Notice of Intent ("NOI") to the EPA, and send a copy of the NOI to CLF within fourteen (14) days of filing.

5. As it has in the past, wherever reasonable and feasible, and in its sole discretion, Fay's will design, install, and implement control measures that employ a low-impact development (LID) approach. LID is a natural-resource-based alternative approach to site design that incorporates a variety of structural and non-structural techniques, such as vegetated areas that collect, treat and infiltrate stormwater and shallow drainage channels that slow runoff and filter it.

III. MONITORING PROGRAM

6. Fay's will conduct quarterly monitoring in accordance with MSGP at all locations specified in the SWPPP for pollutants identified in the MSGP for the Sector Q (i.e., aluminum, iron, lead and zinc) and for the parameters for which Lake Winnepesaukee is impaired (i.e., mercury and pH). Such monitoring shall begin in the first, full quarter of the year following the entry of this Consent Decree (the date that the Court enters this Decree shall be the "Effective Date"). In addition, Fay's will perform inspections pursuant to the requirements specified in the SWPPP.

7. Fay's will send to CLF a copy of each inspection within ten days of the inspection. Fay's will send to CLF each sampling result no later than ten (10) days after receipt.

8. In its sole discretion, Fay's may take additional samples of its stormwater discharges. If it does so, Fay's will send a copy of each such inspection and/or sampling result to CLF no later than ten (10) days after receipt.

9. Within thirty (30) days after this Decree is entered by this Court, Fay's shall designate an environmental engineer to act as the Stormwater Compliance Monitor. The designation shall be subject to CLF's review and approval, which shall not be reasonably withheld. Payment for the Stormwater Compliance Monitor's services shall be the sole responsibility of Fay's. At any time and for any reason, Fay's may designate a new Stormwater Compliance Monitor, who shall be a qualified environmental engineer, and whose selection shall be subject to CLF's review and approval, which shall not be unreasonably withheld. CLF will respond to any request under this paragraph within fourteen (14) days. Fay's will send a copy of the final SWPPP to the Stormwater Compliance Monitor within ten (10) days of CLF's approval.

10. Fay's will not exceed the sector-specific benchmarks identified in the MSGP for Sector Q (i.e., aluminum, iron, lead and zinc) of the MSGP after one year from the Effective Date. Naturally occurring background levels for any compounds set forth in Sector Q of the 2008 MSGP and for the Lake Winnepesaukee impairment parameters shall not be included in determining whether a benchmark exceedance has occurred.

11. Two of Fay's three boat washing stations are connected to the municipal sewer, and a third is to be connected in the spring, 2015, and will not be used until it is connected. The boat washing stations are, or are expected to be by spring, permitted discharges to the publicly owned treatment plant. Fay's shall not discharge process water, including pressure wash water, to waters of the United States except in compliance with an applicable Clean Water Act permit.

12. The Stormwater Compliance Monitor shall assess and report on the compliance or noncompliance of Fay's with the terms of the SWPPP at the Facility on a bi-annual basis during the term of this Decree. The Stormwater Compliance Monitor shall make two site inspections per year. One may be unannounced in the Monitor's discretion. The site visit inspections by the Stormwater Compliance Monitor shall take place during regular business hours. Fay's must provide the Stormwater Compliance Monitor with access to the Facility for the site visit. After the inspection, the Stormwater Compliance Monitor shall provide the Parties with a written report as to whether Fay's is in full compliance with the terms of the SWPPP and the MSGP.

13. If Fay's discovers a violation of the SWPPP or the MSGP during the term of the Decree, or if the Stormwater Compliance Monitor identifies a violation of the SWPPP or the MSGP benchmarks, Fay's shall follow the applicable corrective actions identified in the SWPPP, or the 2008 MSGP, as appropriate, including consideration to revise the selection, design, installation, and implementation of its control measures to ensure the condition has been eliminated and will not be repeated in the future.

14. Within twenty-four (24) hours of either discovering the violation or being informed of the violation by the Stormwater Compliance Monitor, Fay's shall document the violation pursuant to the requirements of the MSGP.

15. Fay's shall provide CLF and the Stormwater Compliance Monitor with documentation of the violation in an annual report and Fay's shall retain a copy of the report onsite with its SWPPP. The annual report shall be completed in conformity with the MSGP.

16. Fay's shall commence corrective actions within fourteen (14) days after it discovers or learns of a violation, or such other conditions designated in the MSGP.

17. Fay's shall complete the documentation required by the MSGP and the SWPPP for the fourteen (14) day period following a violation and provide a copy of such documentation within the 14-day period to CLF and the Stormwater Compliance Monitor.

18. Within thirty (30) days after the discovery of a violation, Fay's shall fully implement corrective actions, if necessary or appropriate, and shall provide written documentation to CLF and the Stormwater Compliance Monitor demonstrating the completion of implementation of corrective actions taken, if any.

19. Prior to the expiration of the 30-day period, Fay's shall schedule a visit by the Stormwater Compliance Monitor to occur after the expiration of the 30-day period at the next "measurable storm event," as that term is defined in the MSGP. During the next measurable storm event, the Stormwater Compliance Monitor shall conduct monitoring activities to assess compliances and submit a report ("Compliance Report") within twenty-one (21) days after the site visit.

20. Unless otherwise agreed in writing by Fay's, or with the permission of this Court, during the term of this Decree, neither CLF nor its agents, representatives, employees, officers, directors, successors or assigns may enter Fay's premises at any time. All compliance monitoring shall be conducted solely by the Stormwater Compliance Monitor. To the extent CLF inspects, photographs, or takes video of Fay's operations from public property during the term of this Decree, it shall provide a copy of such inspection report, photographs, or video to Fay's within 10 days after doing so.

21. During the life of the Decree, Fay's shall copy CLF on all documents related to water quality or Clean Water Act compliance regarding the Facility submitted to any government agency including, but not limited to, the EPA, NHDES, and the Town of Gilford. Such documents shall be provided to CLF concurrently as they are sent to the agencies and/or municipalities.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECT

22. Within three hundred sixty (360) days of the Effective Date, Fay's shall make a supplemental environmental project ("SEP") payment of twenty thousand dollars (\$20,000) to the New Hampshire Lakes ("NH Lakes"), for purchase of a mobile boat washing station for the New Hampshire Lakes to aid in the NH Lakes's efforts to prevent the spread of invasive species on New Hampshire's lakes, including but not limited to Lake Winnepesaukee. Defendant shall notify CLF in writing when the payment is made and provide a copy of the check. Such payment shall be made to the following address:

Tom O'Brien, President
New Hampshire Lakes
14 Horseshoe Pond Lane
Concord, NH 03301

23. For each exceedance of the MSGP benchmarks described in paragraph 11 of this Decree during the term of this Decree, Defendant shall make an additional payment to the NH Lakes in the amount of five hundred dollars (\$500) for environmental restoration of or other environmental benefit to Lake Winnepesaukee. Payment of each such additional amount shall be due fourteen (14) days following each exceedance. CLF shall allow Fay's fourteen (14) days to cure before such additional payment shall be due and owing. Payment of each such additional amount shall be due following the cure period, if Fay's has not cured the violation. Fay's shall not pay more than \$4000 per year during the term of this Decree pursuant to the provisions of this paragraph. Defendant shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check.

24. For each missed deadline included in this Decree, including but not limited to failures to timely conduct quarterly benchmark monitoring and inspections pursuant to Parts 4 and 6 of the MSGP, but not including missed payment deadlines (discussed in paragraph 29 below), Fay's will make an additional payment to the NH Lakes, in the amount of five hundred dollars (\$500) for environmental restoration of or other environmental benefit to Lake Winnepesaukee. CLF shall allow Fay's fourteen (14) days to cure before such additional payment shall be due and owing. Payment of each such additional amount shall be due following the cure period, if Fay's has not cured the violation. Fay's shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check.

25. CLF understands and agrees that two of Fay's boat washing stations are connected to the municipal sewer, and a third is to be connected in the spring, 2015, and will not be used until it is connected. For every day that Fay's discharges process water to waters of the United States without coverage for such discharge under an individual NPDES discharge permit and compliance with the conditions of that individual NPDES discharge permit, Fay's will make an additional payment to the NH Lakes, in the amount of five hundred (\$500) for environmental restoration of or other environmental benefit to Lake Winnepesaukee. Payment of each such additional amount shall be due fourteen (14) days following each unauthorized process water discharge. Fay's shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check.

26. None of the SEP payments shall be disbursed to CLF, directly or indirectly.

V. ATTORNEY FEES AND COSTS

27. On or before June 30, 2015, or within 30 days from the entry of this decree, whichever is later, Fay's shall pay to CLF a sum of \$20,000 in full and complete satisfaction of CLF's fees and costs to date in this matter, including without limitation attorney fees, expert fees, filing fees and other costs.

28. To help defray CLF's reasonably anticipated costs incurred in conducting compliance monitoring and case management during the term of this Decree, Fay's shall pay CLF an additional sum of \$5000 on or before June 30, 2016.

29. In the event that any payment owed by Fay's under the Decree is not made on or before the due date, Fay's shall be deemed in default of its obligations under the Decree. In addition to a continued requirement to make said payment, Fay's shall pay to CLF a late fee of one hundred dollars (\$100) for each day the payment is late. Provided, however, that CLF shall provide fourteen (14) days written notice and an opportunity to cure before such additional payment shall be due and owing. Payment of each such additional amount only shall be due following the cure period if Fay's has not cured the violation, in which case the late fee shall be calculated from the original due date. The maximum amount of payment under this paragraph shall be \$1,000 for any one missed payment deadline. In the event CLF is required to take court action to recover any payments due pursuant to this paragraph, CLF shall also be entitled to recovery of its reasonable attorneys' fees and costs, in the discretion of the Court.

VI. EFFECT OF DECREE

30. CLF covenants not to sue and releases Fay's (and its parent corporations, subsidiaries, officers, directors, shareholders, employees, agents, and consultants) from any and all claims, causes of action, or liability under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for damages, penalties, fines, injunctive relief, or any other claim or relief (i) relating to or resulting from noncompliance with the Clean Water Act, including the 2008 MSGP, at the Facility located at 71 Varney Point Road, Gilford, NH 03249 occurring prior to the date the Court enters this Decree or (ii) for any past violations alleged or which could have been alleged in the Complaint. During the term of this Consent Decree, CLF shall not initiate any suit against Fay's related to any violation of the MSGP or the SWPPP, as any such violations shall be governed by the procedures established in this Decree.

31. Fay's releases and discharges CLF, its representatives, assigns, agents, employees, officers, and attorneys, including those who have held positions in the past from any and all claims, liability, demands, penalties, costs, and causes of action of every nature which concern or are connected with this action.

32. Neither this Decree, nor terms thereof, nor performance of the terms thereunder by Fay's shall constitute or be construed as an admission or acknowledgment by Fay's of the factual or legal assertions contained in this Decree or in CLF's Complaint. Fay's retains the right to controvert in any subsequent proceedings, other than proceedings for the purpose of implementing or enforcing this Decree, the validity of the facts or determinations contained in this Decree or the Complaint. Neither this Decree, nor terms thereof, nor performance of the terms thereunder, shall constitute or be construed as an admission or acknowledgment by Fay's of any liability, or an admission of violation of any law, by Fay's or by its officers, directors, employees, agents, successors, or assigns.

33. CLF does not, by consent to the Decree, warrant or aver in any manner that Fay's compliance with this Decree will constitute or result in compliance with federal or state law or regulation. Nothing in this Decree shall be construed to affect or limit in any way the obligation of Fay's to comply with all federal, state, and local laws and regulations governing any activity required by this Decree.

34. This Decree constitutes the entire agreement among the Parties concerning the subject matter hereof and supersedes all previous correspondence, communications, agreements and understandings, whether oral or written among the Parties.

35. All payments pursuant to this Decree shall be made in form of a bank check, unless otherwise agreed.

36. Any notice required or permitted under this Decree shall be in writing and sent to:

For CLF:

Zachary Knox Griefen
Conservation Law Foundation
15 East State Street, Suite 4

Montpelier, VT 05602
zgrieffen@clf.org

For Fay's:

Fay's Boat Yard, Inc.
71 Varney Point Road
Gilford, NH 03249

With a copy to:

Mark C. Rouvalis, Esq.
McLane, Graf, Raulerson & Middleton, Professional Association
900 Elm Street
Manchester, NH 03105-0326
Tel: 603-628-1329
mark.rouvalis@mclane.com

and to

Regina A. Nadeau, Esq.
Normandin, Cheney and O'Neill
213 Union Avenue
Laconia, NH 03247
Tel: 603-524-4380
rnadeau@nco-law.com

37. This Decree shall remain in effect if Fay's relocates the Facility to a different location.

38. Sections I, IV, V, VI, VII, and VIII of this Decree shall remain in effect regardless of whether the Facility continues to operate or not; provided however, if Fay's ceases to be the owner and/or operator, the compliance and monitoring obligations under this Decree may be transferred to a subsequent owner. Fay's liability under this decree will cease upon transfer of the Facility to a subsequent owner and/or operator, with the exception of Fay's payment obligations under Sections IV, not including any penalty fees incurred following the transfer of ownership, and V of this Decree.

VII. REVIEW AND TERM OF DECREE

39. The Parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), this Consent Decree cannot be entered until forty-five (45) days after the receipt of a copy of the proposed Consent Decree by the United States Attorney General and the EPA. Therefore, upon signing of this decree by the Parties, CLF shall serve copies of this Decree upon the EPA Administrator, the Regional EPA Administrator, and the Attorney General for review, as required by 40 C.F.R. § 135.5.

40. Upon the expiration of the forty-five-day review period provided by 33 U.S.C. § 1365(c)(3), the Parties will jointly move the Court for entry of this Decree. This Decree shall take effect on the date it is entered by this Court. This Consent Decree shall terminate within two (2) years from the Effective Date, provided Fay's has met its final four (4) consecutive benchmark monitoring requirements with no benchmark levels exceedances for any monitoring parameter under the applicable MSGP, subject to the presence of naturally occurring background compound levels as discussed in Section III above. If any quarterly benchmark monitoring events during the second year show exceedances of benchmark levels for any monitoring parameter, subject to the presence of naturally occurring background compound levels as discussed in Section III above, then this Decree shall continue to remain in effect for an additional third year and shall terminate at the end of the third year. If for any reason the Court should decline to approve this Decree in the form presented, the Parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this Decree.

VIII. MODIFICATION AND ENFORCEMENT OF DECREE


41. This Decree may be modified only upon written consent of the Parties and the approval of the Court.

42. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Decree.

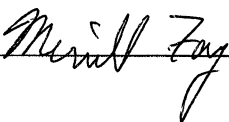
43. Counterparts. Facsimile, electronic and scanned signatures shall be deemed to be originals for all purposes. Copies of the original Agreement, whether transmitted by facsimile or other means, shall be effective. This Agreement may be signed in counterparts.

44. Each person signing this Decree represents and warrants that s/he has been duly authorized to enter into this Decree by the Party on whose behalf it is indicated that the person is signing.

CONSERVATION LAW FOUNDATION

By:  Date: 1/30/15
Christopher M. Kilian
Title: Vice President

FAY'S BOAT YARD, INC.

By:  Date: 2-10-15
Merrill Fay
Title: President

ENTERED and DATED this ____ day of _____, 2015

Honorable Landya B. McCafferty
United States District Judge